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ABSTRACT

On college campuses today, the debate rages over whether self-restraint and tolerance for nonconformity is overriding a need to protect certain individuals and groups from objectionable speech. Some administrators, students, and alumni wish to prevent "bad speech" in the form of expressions of racism, sexism, and the like. Advocates for limiting "bad speech" argue that such expressions do not deserve first amendment protection because the messages cause irreparable harm and are meant to do so. Some researchers argue that the right to privacy which has been identified within the equal protection clause of the fourteenth amendment can limit sexist-racist-hate speech, but the Supreme Court's integrationist reading of the clause contradicts such a view. More speech, not less, is needed to break down the walls of classification, educate others, and provide for equality. Banning hate speech creates an exception to the first amendment which denigrates its meaning. Equality in the pursuit of education will come from a lively discussion of cultural differences, historical happenings, and contemporary uses of language. To force students to refrain from using certain words would deny an opportunity to explore the meaning of equality and understanding, which a tolerant society must not allow. (Forty notes are included.) (SG)

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Rights at Odds: Free Speech and Competing Constitutional Claims

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Racist-Sexist-Hate Speech on College Campuses: Free Speech v. Equal Protection

presented by

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Racist and Sexist Speech on College Campuses:
Free Speech v. Equal Protection

How far must a democratic society that prides itself on being tolerant go to tolerate that which many today find intolerable? The majoritarian viewpoint quite often rules the day when it comes to regulation of aesthetics, public safety, or obscenity. But the majority occasionally tolerate a minority held view, even one which some individuals consider extreme, i.e. Nazis marching in Jewish neighborhoods. On the whole, our society subscribes to the idea of protection for fundamental rights--those rights expressly provided in the Constitution, i.e. first amendment right to freedom of speech, press, religion, and assembly, or those rights which have evolved to a preferred status in American jurisprudence, i.e. rights of interstate travel, participation in the political process, privacy, personal autonomy, and abortion, among others.

What choice do we make when two fundamental rights, first amendment freedom of speech and fourteenth amendment equal protection collide?

Freedom of speech and unconditional equality for all people are ideas set forth in the U.S. Constitution. Equal protection under the fourteenth amendment in theory suggests certain benefits, including opportunities for individuals to take the offensive, for society to not make distinctions between people, and for governments to not deny any person equal access under state or federal laws. In practice, the right to equality has developed over time; the subjects addressed under this amendment are products of historical forces that represented the day's political and social agenda. The first amendment guarantees, among other freedoms, the right to speak freely, a freedom exercised daily in college classrooms, streets and parks, the workplace, and in private residences. To speak without fear on topics of our choice in a manner we enjoy is as natural to most of us as are breathing or eating. The freedom is taken to grander heights when those we address choose to listen and engage in the debate of words

and ideas. Should the words we choose fill the air with "verbal cacophony," it is as Justice Harlan said "not a sign of weakness but of strength."[1]

On college campuses today the debate rages over whether our celebration of self-restraint and tolerance for nonconformity is overriding a social mandate that certain individuals and groups be protected from speech that falls out of mainstream acceptance. The list of indefensible words, so-called "bad speech," administrators, students and alumni are attempting to prevent on campuses includes expressions of racism, sexism, homophobia, anti-Semitism and prejudice against the handicapped. Currently there are nation-wide regulations designed to limit speech at Emory University, the University of Wisconsin, the University of California, the University of Buffalo Law School, and New York University Law School, among others. A student violating these regulations in classrooms, dining halls, libraries, fraternity events, dormitories, radio broadcasts, newspapers, posters, or t-shirts can be disciplined, or expelled, for words that create "an intimidating, hostile or demeaning environment for educational pursuits."[2] At the University of Wisconsin for example, the code requires that a student not "intentionally" set out to "demean the race, sex or religion" or another person, or make a "racist or discriminatory comment or other expressive behavior directed at an individual."[3] At the University of Pennsylvania students may be punished for using any language that "stigmatizes or victimizes individuals" and "creates an intimidating or offensive environment." [4]

A review of the growing body of literature that addresses racist-sexist-hate speech supports the idea that our society is finding tolerance of freedom of speech more difficult when it stands nose-to-nose with freedom from harassment and discrimination. Those pushing for stricter rules that place limits on speech complain that freedom of speech is given too important a position, that the right to be free from intolerance and racial-sexist bias is equally, if not more so, important in the hierarchy of

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[1] Cohen v. California, 403 U.S. 15, 24 (1971).

[2] Nat Hentoff, "Flexing Muzzles, Free Speech on Campus is Being Attacked from an Unlikely Direction--the Left," Playboy, January 1990: 120.

[3] Id at 120.

[4] Jon Wiener, "Words that Wound, Free Speech for Campus Bigots?, The Nation, 26 February 1990 273

freedoms. Those who fight against setting further limits on freedom of speech argue that policies designed to regulate offensive speech are usually too broad: the individual's ideas are swallowed up with the speech. They suggest that students who are not certain of what is acceptable speech will be afraid to express or discuss out-of-the-mainstream ideas on campus.[5]

Advocates for restraint of "bad speech" argue that such communication is offensive to others, often inflammatory and devoid of intellectual content.[6] Here the argument is that racist-sexist-hate insults are undeserving of first amendment protection because the speaker's "intention is not to discover truth or initiate dialogue but to injure the victim." [7] Even if such speech did convey traditionally protected ideas, the speakers could select from many adequate alternatives without "diluting either the social idea itself or the rhetorical power of conviction, or emotive force, with which it is conveyed." [8] They insist that "bad speech" cannot contribute to the pursuit of truth and understanding--two goals to which most colleges and universities are in the business of providing access. The poster, for example, that a University of Connecticut student displayed on her dormitory door which listed the types of people who were "welcome," "tolerated," "unwelcome," and "shot on sight" would not be allowed. In the instance case, the "shot on sight" category included "bimbos, preppies, racists," and some students said "homos." The student was expelled from university residential and dining halls in April, 1989, but a a Federal District Court in Hartford last fall approved a settlement that reinstated her room and board privileges, and forced the university to change its anti-harassment rules.[9]

Another argument for restraint is that "words wound" and cause irreparable harm to the message recipients.[10] Researchers point to psychological, sociological, and

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[5]Sara Hyland, "On the Campuses, The First Amendment Stops Here?, Rights June/August 1990: 6.

[6] *See* R. George Wright, "Racist Speech and the First Amendment," Mississippi College Law Review, 9 (1988): 1; David Kretzmer, "Freedom of Speech and Racism," Cordozo Law Review, 8 (1987): 445; Richard Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," Harvard Civil Rights-Civil Liberties Law Review, 17(1982): 133.

[7] Charles Lawrence, "Yes," Stanford Lawyer, Spring 1990: 2.

[8] Wright, *supra* note 6, at 3.

[9] Hyland, *supra* note 5, at 6,7.

political effects of racial and sexist words, building an argument around the concept of harm that the utterance of these words causes. Professor Richard Delgado argues that such language "injures the dignity and self-regard of the person to whom it is addressed," and affects our institutions. [11]

Is our tolerance creating a "sense of disjunction" in our attitude toward continuing to allow the freedom and exercise of all speech--even that defined as racist, sexist, hate speech? [12] Should we instead march under the banner of equal protection toward a general theory of free expression that adds another category of exceptions to those of obscenity, direct incitement, and "fighting words" to define what speech is allowable this year; a category for "words that wound?"

Equality is basic to a democratic society. Section 1 of the fourteenth amendment constitutes the amendment's heart stating: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside." Section 1 also states that no state shall deprive any person of "life, liberty, or property" without "due process" of law. The due process clause ultimately allowed the Court to incorporate most Bill of Rights guarantees, including freedom of speech, to the states, and also enabled the Court to review state policies, particularly those regulating private property rights. Section 1 concludes by saying that no state shall deny to any person within its jurisdiction the equal protection of laws. The Court has interpreted the function of this provision under a "reasonableness" standard; a standard that prohibits unjustified classifications that might discriminate unreasonably.

The fourteenth amendment, a post-Civil War amendment added to the Constitution in 1868, brought a federal presence to the protection of civil rights, but early interpretations of the amendment preserved a dominant role for the states in this policy area. Only recently has the amendment produced major changes, primarily

[10] Delgado, *supra* note 6, at 133.
[11] *Id* at 136.
[12] Lee C. Bollinger, The Tolerant Society. Freedom of Speech and Extremist Speech in America. (New York Oxford UP, 1986) 14.

through expanded construction of the due process and equal protection clauses. Many argue that the fourteenth amendment has become the cornerstone of civil-rights policy.

On its best day, equal protection is ensured by the fourteenth amendment for all people; no distinctions are allowed based on race or other classifications, and fundamental interest arguments must be compelling. In practice, equal protection for education, work and salary opportunities for all people regardless of race, gender, or wealth have met resistance. Originally the clause was reserved for guaranteeing former slaves equal treatment under the law and certain basic civil rights; private acts of discrimination were placed outside the reach of the clause.

The equal protection clause was expanded, however, as the courts became more involved in civil liberties questions. Considering classifications other than race, the courts have attempted to distinguish reasonable and permissible classifications from arbitrary and impermissible ones. Legislatures are generally given wide discretion in making classifications, and classifications are presumed valid if they rationally relate to the legislature's objective. Under the reasonable standard of classification, the burden of proof is on the party claiming the legislation has no rational or reasonable basis. A classification may be subjected to a stricter scrutiny standard, however, if the classification impinges on a fundamental right that is understood as a right expressly protected, such as freedom of speech, or a fundamental right that has evolved, such as abortion.

The strict scrutiny standard is a closer examination made by the courts, and requires a state to show more than reasonableness for a classification. The state must demonstrate a compelling interest that can only be addressed by use of the particular classification, must be precisely drawn, and employ the least drastic means possible to achieve its objectives. The burden of proof shifts to the state in cases where strict scrutiny is applied. The strict scrutiny standard also applies if the classification is "suspect." Historically, a suspect class is one that is the recipient of purposeful unequal treatment over time, or is a class that occupies such a politically powerless

position that it requires extraordinary protection within the political process. Usually, classifications based on race or religion--but not on gender, age, or wealth--are considered to be inherently suspect.

Some researchers argue that a fundamental right to privacy can be found in the newer interpretation of the equal protection clause, and this right to privacy can prohibit sexist-racist-hate speech in private areas such as dorm rooms, and limit speech in classrooms, dining halls and libraries. Although not specifically stated in the Constitution or amendment, the idea of a right to privacy may actually come from an aggregation of various Bill of Rights protections. The Supreme Court first acknowledged a right of privacy in *Griswold v. Connecticut.*[13] Justice Harlan argued that the due process clause of the fourteenth amendment offered protection against invasions of privacy stating the Connecticut prohibition on the distribution of contraceptives violated basic values necessary for liberty.

The Court has rejected the view, however, that the right of privacy is unlimited or absolute, choosing instead to attach appeals to privacy to other fundamental rights.[14] In *Roe v. Wade* the Court held that assertions of the right of privacy must be weighed against state regulatory interests. [15] It would seem, therefore, that the concept of a right to privacy, along with the equal protection clause, is still in the evolution process.

Using the equal protection clause of the fourteenth amendment to thwart racist-sexist-hate speech on college campuses appears risky at best. While civil rights advocates agree that equality may be the right most likely to bring forth attention to social conditions and penetrate the foundations of government, its meaning is defined by recent courts with their focus on integrationist strategies. Co-mingling is the order of the day. The view of equal protection as simply a protection from classifications is a hand-me-down from *Plessy v. Ferguson* where the justices refused to take account of the harm caused by a classification.[16] The reaction to that harm, in *Brown v. Board*

[13] 381 U.S. 479 (1965).

[14] *See* Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973).

[15] 410 U.S. 113 (1973).

[16] 163 U.S. 537 (1896).

of Education was reversal; the case became the foundation for an integrationist interpretation of the Constitution. [17]

Wearing our integrationist approach hat, let us assume that if one thing is equal to another it requires a basis for comparison. If it is agreed, for example, that the social arena--which includes colleges and universities--defines how we as individuals are treated, our status, and the value we and others place on different kinds of opportunities, then the *differences* in how we are treated, our status, and values between participants in the social arena are a legitimate basis for comparison.[18] In view of this, are some students treated differently or have a different status at colleges and universities than their peers? The answer is yes: some participate in work-study programs, receive scholarships, financial aid, or tutoring, obtain dorm rooms with a window, are out-of-state residents and pay higher tuition than in-state residents, logged higher SAT and ACT scores, demonstrated superb athletic ability, have skin of color, red hair or wear orthodontics.

Certainly students who are both senders and recipients of racist-sexist-hate remarks in college classrooms, dorms, dining halls, libraries and elsewhere have chosen to take advantage of the Court's integration interpretation of equality by thrusting themselves into the vortex of the educational-social arena. Otherwise they could remain at home, cloistered in their own community, classified as Susan, High-School-Math-Wizard or Joe, Thespian-of-the-Year. By choosing to attend college--and for many expending considerable energy and resources to do so--they are signing up for more than classes in business, communication and math. They are defining and re-defining the meaning of equality by discovering the *differences*: what others think, how they act, and the ramifications of such thoughts and actions. Some are learning that college for many is a new opportunity for discovery, testing and discussion of attitudes, beliefs and values. Others are learning that college is quite possibly their last opportunity for discarding excess baggage; there is no room in a democratic, multi-

[17] 347 U.S. 483 (1954).

[18] *See* John Bringham, Civil Liberties and American Democracy. (Washington D.C.: Congressional Quarterly Inc,1984) chapter six , for a discussion on equality.

cultural, push-for-integration society for an overnight bag of racist jokes and slurs. We have spent the last decade promulgating the idea that affirmative action was reverse discrimination against whites; that integration has brought more individuals to the smorgasbord of opportunity and a lot of pushing and shoving is going to happen before everyone gets a piece of the pie. These differences in human thought and action that some are seeking protection from and others understanding of cannot be solved by invoking the equal protection clause. Invoking the freedom of speech clause, however, does offer an opportunity for change.

More speech, not less is required to break down the walls of classification, educate others, and provide for equality. To call for a ban or to invoke regulations based on the mere utterance of racist-sexist-hate words is to create an exception to the first amendment freedom of speech clause that denigrates its meaning and forces individuals to make choices about the words they can use. Those who write or have implemented regulations designed to protect the victim from "bad speech" must acknowledge first amendment doctrine--including its current limitations on speech--in their creation and enforcement of regulations. To not do so is to, at the very least, pander to the tastes of the majority at the expense of the minority. Regulators may be faced with students like the ones at Tufts University who symbolically separated their campus into three areas: the free speech zone, the limited speech zone, and the twilight zone in protest to the administration's leveling of speech.

Freedom of speech is not without limits. In theory for some and in practice for many, speech that is libelous, obscene, or uses "fighting words" is banned, and speech that infringes on specific, demonstrated government interests is regulated. A content-based restriction that determines which words are unacceptable, i.e,. "You damn nigger," "Boy," and "You dumb honkey," and which are acceptable, "Hey Nigger" [19] will be sustained by the courts only if it "is a precisely drawn means of serving a compelling state interest." [20] Content-based restrictions on first amendment protected speech receive the closest scrutiny by the courts.

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[19] Delgado, *supra* note 6, at 179-80.

[20] Consolidated Edison v. Public Service Comm'n, 447 U.S. 530, 540 (1980).

Returning to the arguments for limiting racist-sexist-hate speech, advocates suggest that such speech is offensive to others, often inflammatory, is devoid of intellectual content, and causes psychological, sociological and political harm. R. George Wright suggests that the "use of crudely insulting racist invective, in the form of invidious racial epithets, alone or in the context of other speech," be restricted on the grounds that such speech "does not amount to an attempt to communicate any particular social idea." [21]

At one time or another, most of us have been confronted with speech that we find offensive. Each of us have our own connotative definition of offensive words, or in the context of speech-plus offensive acts, and probably more than once have wished that the sender of the message would select another offering. But the utterance of words alone most often balances in favor of the first amendment. [22] Free expression has always operated in a "somewhat rowdy fashion," [23] the refusal to suppress offensive speech is a difficult obligation, but one that the principle of free speech imposes on us all.

The courts have held that offensive speech may not be regulated in public forums where the listener may avoid the speech by moving on or selecting alternate routes. District Court Judge Avern Cohn ruled in September 1989 that the University of Michigan had drafted such a regulation and that it was too broad. "What the University could not do," he said, was "establish an anti-discrimination policy that had the effect of prohibiting certain speech because it disagreed with ideas or messages . . . Nor could the University proscribe speech simply because it was found to be offensive, even

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[21] Wright, *supra* note 6, at 2.

[22] The Court's rejection of official censorship of content is fairly common. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940) ruling against enforcement of a breach of peace statute based on officials dislike of the speaker's ideas; Edwards v. South Carolina, 372 U.S. 229 (1963); Cohen v. California, 403 U.S. 15, 22 (1970) Justice Harlan writing that the state may not excise "one particular scurrilous epithet from the public discourse"; Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92 (1972); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) ruling that the Constitution prohibits the government from singling out a particular type of speech for prohibitionon the basis that it is offensive to an unwilling audience.

[23] Thomas I. Emerson, "The State of the First Amendment as We Enter '1984,'" Freedom at Risk. Secrecy, Censorship, and Repression in the 1980s, ed. Richard O. Curry (Philadelphia. Temple University Press, 1988) 31,33.

gravely so, by large numbers of people." [24] In addition, a broad regulation, such as the former one at the University of Connecticut that punished students for the use of "derogatory names," "inappropriately directed laughter," "inconsiderate jokes," "conspicuous exclusion of another student from conversation," will require re-writing as demonstrated by the Federal District Court in Hartford's settlement approval of a student complaint. [25]

Protection has not been limited to what the listener feels comfortable hearing or seeing, individuals are invited instead into the "marketplace of ideas." No distinction is made between opinions on the basis of truth, assuming that no person is infallible. "Much that is said," according to first amendment scholar Thomas I. Emerson, "is false or misleading, impugns the motives of the opposition, is intemperate, or appeals to prejudice rather than reason." [26] This robust treatment for speech supports the argument that truth will eventually win the day in the face of false opinions through reasoned objections and commitment of the speaker. Because most of us dislike the idea that a student could walk up to another student of any race, culture or ethnic background and say "We don't want Japanese students at Alaska Pacific University," does not grant us the opportunity to prohibit that speech. But the opportunity to correct that false idea is available on college campuses and, perhaps, mandated through speech that counters and clarifies such statements.

A second reason offered for limiting racist-sexist-hate speech is that some individuals find the emotive quality of speech inflammatory and see no reason for protecting racist-sexist-hate epithets. Wright suggests the "practically available alternatives to sheer racist epithets will often in fact be superior." [27] The U.S. Supreme Court in *Cohen v. California* determined that the first amendment protects the "emotive" and "cognitive" aspects of speech. [28] The Court recognized that how one says something is as important--and as much protected--as what one says.

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[24] Doe v. University of Michigan, 721 F. Supp. 852 (1989).
[25] Hyland, *supra* note 5, at 7.
[26] Emerson, *supra* note 23, at 34.
[27] Wright, *supra* note 6, at 3.
[28] 403 U.S. 15, 26 (1971).

Justice Harlan wrote: "We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated." [29] An argument can be made that there are many individuals who do not have the vocabulary or the desire to select words that convey the same meaning in a "nicer way." Those that do have the vocabulary may still choose to select words that receivers understand in an instance--words that generate the response they want, the immediate association of meaning.

Some colleges, the University of Wisconsin, Pennsylvania State University and the nine-campus University of California system, the University of Connecticut (in their re-write of their formerly over-broad regulation) have adopted a narrow policy and used language drawn from the "fighting words" doctrine which exempts first amendment protection from certain epithets spoken in a face-to-face confrontation. This approach seeks to permit all public speech and prohibits only the most threatening and inflammatory cases of direct, intentional, verbal speech. Several problems exist with this approach, beginning with the Court's decision in the *Chaplinsky v. New Hampshire* case. [30]

In the nearly fifty years since the ruling in *Chaplinsky* the Court has repeatedly refused to recognize the applicability of the "fighting words" exception by affirming challenged convictions. This lack of subsequent application has caused several first amendment scholars to question whether the Court was correct in ruling that it is a crime to call a police officer a "God damned racketeer" and "a damned Fascist." Certainly the post-Cohen decisions regarding racial epithets, i.e. "black motherfucking pig," [31] "vulgar, suggestive, and abhorrent sexually oriented statements," [32] and abusive words to a policeman, including a racial reference, [33] indicate a willingness

[29] Id at 26.

[30] 315 U.S. 568 (1942).

[31] Brown v. Oklahoma, 408 U.S. 914 (1972).

[32] Plummer v. City of Columbus, 414 U.S. 2 (1973).

[33] Gooding v. Wilson, 405 U.S. 518 (1972).

on the majority of the Court to pay only "lip service" to *Chaplinsky's* fighting words doctrine while vacating convictions for offensive words, including racial insults. [34]

Despite the tenuous nature of the "fighting words" doctrine, universities are turning to it in an attempt to draft narrow regulations that eliminate, at least, the face-to-face speech. Targets of the racist-sexist-hate speech are frustrated since regulation under the "fighting words" concept does not allow for punishment of statements that are not face-to-face confrontations. Broadcasting racist jokes, holding mock "slave auctions," or placing posters on dormitory doors, for example, are exempt.

A third argument offered is that racist-sexist-hate speech is devoid of intellectual content, and therefore should not be permitted. The principle of freedom of speech protects all speech, fact or opinion, whether true or false. A policing of the relative merit of the content to determine whether it is "intelligent" is the very antithesis of what the freedom represents. While the actions that result from the speech may be policed, the ideas, their subsequent organization and expression, cannot be prohibited by prior restraint because someone thought they were unworthy.

Those who argue for censorship of speech that they assume contributes nothing to the day's debate--with the goal of promoting equality--should note the dichotomy of their argument. Are they suggesting that speech be examined in light of the equal protection clause; that we develop an "intelligent classification" for speech based on content? Certainly, as Harry Kalven suggests, classification of speech by content would place it in a "suspect" category, along with "suspect" classifications of race and religion. From such a perspective, Kalven asks: "What is the difference between the content of the messages we permit and the content of those we prohibit?" [35]

One can make an argument, as Justice Black does in *Cox v. Louisiana,* that selecting certain views among the offerings is "trying to prescribe by law what matters of public interest people . . . may not discuss." He states that to deny individuals the use of a public forum "because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, . . .

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[34] Id. at 537, Blackmun, J., dissenting.

[35] Harry Kalven, Jr.,Preface, A Worthy Tradition, (New York: Harper and Row, 1988): 4.

amounts to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment." [36] Surely, in the name of equality, we cannot deny some messages by classifying them as "non-intelligent" and relegating them to a back-of-the-bus position.

Finally, Professor of Law Charles Lawrence, among others, suggests that there can be no "meaningful discussion of how we should reconcile our commitment to equality with our commitment to free speech until it is acknowledged that racist speech inflicts real harm, and that this harm is far from trivial." He suggests that "we are often quick to say that we have heard the cry of the victims when we have not," arguing that "we have not all known the experience of victimization by racist, misogynist, and homophobic speech." [37] Those who have been victims of racist-sexist-hate speech, and those who empathize with the victims, rarely quarrel with the claim that words can harm. Depending on the strength or weakness of each individual's self-concept, and the meaning each person attaches to words, the degree of harm, however, will vary.

If the notion of "harm" becomes the baseline for measurement of interactions with others, then virtually any comment can become a concern of harm to others. As C. Edwin Baker states: "Both the racist insult and telling the end of the movie can harm the listener." [38] Speech-caused harm occurs because people adopt attitudes and beliefs based on their perceptions--which quite often are inaccurate. Most individuals do not spend the energy to observe the behavior of others, analyze what they see and hear, and ask questions to seek clarification before acting on their perceptions. Because we cannot measure harm, any more than we can measure beauty, friendship, or what is funny, a showing of harm does not suffice to deny first amendment protection.

Justifications for protecting harm-causing speech are, of course, controversial. The majority must respect the freedom of equality and individuality of each person, both the sender and receiver of the message. The listener is not required to accept the

[36] 379 U.S. 536 (1965). *See also* Chicago Police Department v. Mosley, 408 U.S. 92 (1972).
[37] *Supra* note 7, at 40.
[38] Human Liberty and Freedom of Speech, (New York: Oxfor UP,1989): 73.

speech of the sender; the speaker's harm-causing speech should not interfere with the listener's decision-making opportunities, because the listener has no right to determine for the speaker what he or she plans to say. Regulating or banning speech because the listener might adopt certain opinions, and therefore be influenced, or harmed, by the speech does not allow the listener responsibility and freedom for rebuttal. Francis Dennis, an 18-year-old half Tlingit and half Inupiaq, demonstrates the preferred response to harm-causing speech. Dennis dressed in his Chilkat robe and headdress and walked to the potlatch site in Juneau, Alaska. As he walked through town a group of white teens called him "dirty filth." Dennis responded to the individual who was yelling stating: "You've got a problem."[39] We cannot separate out for punishment those who are not sophisticated or skilled enough to conceal or display their prejudices in a more constructive manner. We cannot deny those at which the harm-causing speech is directed the opportunity to reply.

Certainly the elimination of racist-sexist-hate speech could qualify as a compelling state interest, and is one in which universities have a stake. But to set the word police loose in their efforts to define and regulate such speech is to deny the opportunity to *use* speech "to mount a counterattack for the hearts and minds of those the hate-mongers seek to influence." [40] We must remember that freedom of speech is more than a personal privilege for each individual to speak his or her mind; it is a responsibility.

Colleges and Universities have legitimate interests in the free and open communication of ideas, no matter how scurrilous they appear to be. Administrators are charged with the responsibility to provide an atmosphere of education for all. This responsibility includes allowing students to speak freely on issues of the day, to question ideas and concepts they are unsure--or too sure--about, and to vent emotive statements that often are designed to shock and offend. Administrators do not have the

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[39] Edward Robinson, "Racism, Prejudice a Lifelong Foe for Minority Children," Anchorage Daily News August 31, 1990, Section G, Col 1.

[40] Harry L. Rosenfeld, "Time to Mount Counterattack Against Hate, Racism," editorial, Anchorage Daily News 11 August 1990: B11.

right to decide for others which speakers are fit to be heard or which public discussions deserve to take place; they should exhibit greater, not less, freedom of expression than prevails in society at large.

Students have the obligation to enroll in classes and to attend to those discussions that will increase their knowledge, thinking skills, and participation in problem-solving and decision-making activities. Teachers have the obligation to provide a forum for learning; to allow for discussion of urgent and not-so-urgent issues of the day, analysis and synthesis of information, and exploration of ideas. All have the obligation to look to the context of the communication and to select the appropriate words that will get the speaker's meaning across.

To limit the communication of some, because others find the words disgusting or the forum unacceptable, dead-ends an avenue for debate. Colleges and Universities that pass regulations designed to tell students what they are not allowed to say will ultimately suppress what students think. Any individual who has to refer to a list of permitted words during the intensity of discussion will be chilled in his or her speech effort.

While the victims of racist-sexist-hate speech on college and university campuses and elsewhere certainly have the sympathy and oftentimes verbal support of those of us not sending such messages, we cannot decide that the contents of some messages are more worthy and easy on the ears than others. To do so would be to set a prescribed standard for speech that ignores the uniqueness of speech and each person's interest in his or her personal selection of words. Equality in the pursuit of education will come from the lively discussion of cultural differences, historical happenings and contemporary uses of language. To force students to refrain from using certain words because of the effect such words may have on their peers is to deny an opportunity for exploring the meaning of equality and understanding--something that a tolerant society must not allow.